

1 ERIC D. HOUSER (SBN 130079)
2 ELIZABETH DOLAN SCOTT (SBN 241376)
3 **HOUSER & ALLISON, APC**
4 9970 Research Drive
Irvine, California 92618
Tel: (949) 679-1111; Fax: (949) 679-1112
Email: escott@houser-law.com

5 Attorneys for Defendants HSBC BANK USA, N.A. AS TRUSTEE FOR LUMINENT
6 MORTGAGE TRUST 2006-7, MORTGAGE PASS THROUGH CERTIFICATES, SERIES
7 2006-7; POWER DEFAULT SERVICES, INC.; OCWEN LOAN SERVICING, LLC; and
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT COURT OF CALIFORNIA**

10 KELLY N. MORAN,

11 Plaintiff,

12 vs.

13 HSBC BANK USA, N.A. AS TRUSTEE FOR
14 LUMINENT MORTGAGE TRUST 2006-7,
15 MORTGAGE PASS THROUGH
16 CERTIFICATES, SERIES 2006-7; WELLS
17 FARGO BANK, N.A.; POWER DEFAULT
18 SERVICES, INC.; OCWEN LOAN
SERVICING, LLC; FIDELITY NATIONAL
TITLE COMPANY; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC.; AND DOES 1-100, inclusive,

19 Defendants.

20 Case No. 5:14-cv-00633-LHK

21 Honorable Lucy H. Koh

22 **MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT BY DEFENDANTS
OCWEN LOAN SERVICING, LLC. AND
DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR
EQUIFIRST LOAN SECURITIZATION
TRUST 2007-1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES
2007-1**

23 Date: August 7, 2014

Time: 1:30 p.m.

Courtroom: 8, 4th Floor

24 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

25 **PLEASE TAKE NOTICE** that on August 7, 2014 at 1:30 p.m., or as soon thereafter as this
matter may be heard, in Courtroom 8 of the above-entitled Court, located at 280 South 1st Street,
26 San Jose, CA 95113, Defendants HSBC BANK USA, N.A. AS TRUSTEE FOR LUMINENT
27 MORTGAGE TRUST 2006-7, MORTGAGE PASS THROUGH CERTIFICATES, SERIES
2006-7; OCWEN LOAN SERVICING, LLC; and MORTGAGE ELECTRONIC

1 REGISTRATION SYSTEMS, INC., (collectively "Defendants") hereby move to dismiss the
2 Complaint filed by Plaintiff KELLY N. MORAN. ("Plaintiff").

3 This Motion is made and based upon Federal Rule of Civil Procedure 12(b)(6) on the
4 grounds that the Complaint fails to state a claim upon which relief may be granted against
5 Defendants. This motion is based upon this Notice of Motion, the Memorandum of Points and
6 Authorities attached hereto, and upon all pleadings, papers, and documents on file herein, as well
7 as any oral argument that may be presented at the time of the hearing, or any matters of which
8 judicial notice is requested and/or taken.

9
10
11 Dated: March 17, 2014

HOUSER & ALLISON
A Professional Corporation

12
13
14 /s/ Elizabeth Dolan Scott
15 Eric D. Houser
16 Elizabeth Dolan Scott
17 Attorney for Defendants HSBC BANK
18 USA, N.A. AS TRUSTEE FOR
19 LUMINENT MORTGAGE TRUST 2006-7,
20 MORTGAGE PASS THROUGH
21 CERTIFICATES, SERIES 2006-7; POWER
22 DEFAULT SERVICES, INC.; OCWEN
23 LOAN SERVICING, LLC; and
24 MORTGAGE ELECTRONIC
25 REGISTRATION SYSTEMS, INC.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff owns the property located at 73 Piazza Court, San Jose, California. (Complaint, ¶2). Defendant Ocwen Loan Servicing, LLC. (“Ocwen”) is the current loan servicer for a loan secured by the property. Defendant HSBC BANK USA, N.A. AS TRUSTEE FOR LUMINENT MORTGAGE TRUST 2006-7, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-7 (“Deutsche Bank, as Trustee”) is the Beneficiary under the Deed of Trust securing the subject loan.

9 Plaintiff has failed to state a valid claim for relief. Plaintiff's Declaratory Relief claims
10 fail as under California Law Plaintiff has no standing to challenge who the beneficiary is under
11 the Deed of Trust. Plaintiff's Wrongful Foreclosure claim fails as this claim is premature as
12 there has been no foreclosure sale. The Breach of Contract claims fail there can be no Breach of
13 Contract if the parties have no interest in the Deed of Trust as Plaintiff alleges. Plaintiff's
14 Slander of Title claim fails as foreclosure documents cannot be a basis for a Slander of Title
15 claim. Lastly, Plaintiffs Unfair Competition Law claim fails it is based upon acts which stated
16 throughout this Motion, cannot impose any liability upon any of the Defendants.

17 The Intentional Infliction of Emotional Distress Claim fails as Plaintiff has failed to
18 allege sufficiently extreme and outrageous conduct, and therefore is not entitled to relief under
19 this statute. Lastly, Plaintiff's Unfair Competition claim fails as Plaintiff has failed to allege a
20 predicate act that could impose liability under this statute. For these reasons, and the reasons set
21 forth below, moving Defendants' Motion to Dismiss should be granted without leave to amend.

II. PLAINTIFF HAS FAILED TO STATE ANY VALID CLAIM FOR RELIEF

A. Plaintiff's First Claim for Relief for Declaratory Relief is Fatally Defective.

24 The court may refuse declaratory relief in any case where it appears on the face of the
25 Complaint that a declaration or determination is not necessary or proper at the time under all the
26 circumstances. Code of Civil Procedure §1061; Moss v. Moss, 20 Cal.2d 640, 642 (1942). The
27 availability of other legal or equitable remedies which are as speedy and adequate and as well
28 suited to plaintiff's needs as declaratory relief renders declaratory relief unnecessary.

1 Communist Party v. Peek, 20 Cal.2d 536, 540 (1942). Here, the Declaratory Relief claim for
 2 relief should be dismissed as it is not necessary at this time. Plaintiff has stated numerous other
 3 legal or equitable remedies that render this cause of action unnecessary.

4 In any case, Plaintiff has not shown that she is entitled to Declaratory Relief. Plaintiff
 5 bases her claim on the foreclosure argument that is making the rounds in these wrongful
 6 foreclosure cases, that the current beneficiary of the Deed of Trust does not have standing to
 7 foreclose as the beneficial interest in the Deed of Trust was not transferred to HSBC Bank as
 8 Trustee timely as set by the rules of the Trust Pool itself.¹

9 However, this claim fails as Plaintiff does not have standing to bring this argument. The
 10 borrower has no standing to challenge either the beneficiary or the trustee's right to act as the
 11 pursuant to the terms of the Deed of Trust, and cannot challenge the beneficiary's right to either
 12 assign its interest in the Deed of Trust, substitute in a new foreclosure trustee or proceed to
 13 foreclosure sale. Gomes v. Countrywide Home Loans, 192 Cal.App.4th 1149, 1154-1155
 14 (2011) ("Nowhere do[] the [foreclosure statutes] provide for a judicial action to determine
 15 whether the person initiating the foreclosure process is indeed authorized....The recognition of
 16 the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure
 17 on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the
 18 process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid
 19 foreclosures."); Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal.App.4th 497, 511-513 (2013)
 20 ("California Courts have refused to delay the non-judicial foreclosure process by allowing
 21 trustor-debtors to pursue preemptive judicial actions to challenge the right of the foreclosing
 22 'beneficiary' or beneficiary's 'agent' to initiate and pursue foreclosure"). For these reasons,
 23 Plaintiff's Declaratory Relief Claim is fatally defective.

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27 ¹ Defendant HSBC Bank as Trustee is alleged to be the Trustee of the Luminent Mortgage Trust 2006-7, Mortgage
 28 Pass –Through Certificates, Series 2006-7 (Complaint, ¶8).

B. Plaintiff's Second Claim for Relief for Wrongful Foreclosure is Fatally Defective.

It is apparent from the documents and pleadings before the court that no foreclosure sale has occurred. As no sale has occurred, Plaintiff's claim for wrongful foreclosure is premature. Ghuman v. Wells Fargo Bank, N.A., --- F.Supp.2d ----, 2013 WL 552097 at *6 (E.D.Cal. 2013) *citing* Rosenfeld v. JPMorgan Chase Bank, 732 F.Supp.2d 952, 961 (N.D.Cal. 2010). For this reason, Plaintiff's Wrongful Foreclosure claim should be dismissed without leave to amend.

8 Secondly, Plaintiffs' Wrongful Foreclosure claim fails as Plaintiff has not alleged, nor
9 can she show, that she can tender the amounts due under this loan. Wrongful foreclosure is an
10 action in equity, where a plaintiff seeks to set aside a foreclosure sale. See Abdallah v. United
11 Sav. Bank, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996); Karlsen v. American Sav. &

12 Loan Ass'n

13 As a prerequisite to stating a wrongful foreclosure claim, a plaintiff must demonstrate
14 that he has made a “valid and viable tender [offer] of payment of the indebtedness.” Pantoja v.
15 Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1183-84 (N.D. Cal. 2009) *citing* Karlsen
16 v. American Sav. & Loan Assn., 15 Cal.App.3d 112 (Ct.App.1971); Arnolds Mgmt. Corp. v.
17 Eischen, 158 Cal.App.3d 575, 578 (Ct.App.1984) (“[A]n action to set aside a trustee’s sale for
18 irregularities in sale notice or procedure should be accompanied by an offer to pay the full
19 amount of the debt for which the property was security.”) A plaintiff must (1) demonstrate a
20 willingness to pay and (2) show the ability to pay. In re Worcester, 811 F.2d 1224, 1231 (9th
21 Cir.1987). A valid and viable tender offer is the plaintiff’s ability to pay back what the plaintiff
22 has received less interest and finance charges. Alcaraz v. Wachovia Mortg. FSB, 592 F.Supp.2d
23 1296, 1304 (E.D.Cal.2009) (citation omitted). Here, Plaintiff not alleged tender, nor that she
24 has the ability to tender. Given that she is in default on her loan, it is unlikely that Plaintiff has
25 the sum to tender even the sum overdue on the loan, let alone the entire loan balance.

26 Lastly, Plaintiff's Wrongful Foreclosure claim fails as Plaintiff cannot demonstrate an
27 alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests.
28 *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272 (2011). A nonjudicial

1 foreclosure sale is presumed to have been conducted regularly, and the burden of proof rests
 2 with the party attempting to rebut this presumption. Melendrez v. D & I Investment, Inc., 127
 3 Cal.App.4th 1238, 1258 (2005) (“It is the burden of the party challenging the trustee’s sale to
 4 prove such irregularity and thereby overcome the presumption of the sale’s regularity.”); Knapp
 5 v. Doherty, 123 Cal.App.4th 76, 86, fn. 4 (2004). (“A nonjudicial foreclosure sale is presumed
 6 to have been conducted regularly and fairly; one attacking the sale must overcome this common
 7 law presumption ‘by pleading and proving an improper procedure and the resulting prejudice’”)
 8 Prejudice is not presumed from “mere irregularities” in the process. Angell v. Superior Court,
 9 73 Cal.App.4th 691, 700 (1999) (failure to comply with procedural requirements must cause
 10 prejudice to plaintiff.).

11 Here, Plaintiff’s claim of irregularity in the foreclosure sale process is that the
 12 Beneficiary was not properly assigned the Note and Deed of Trust. Fontenot v. Wells Fargo
 13 Bank, N.A., 198 Cal.App.4th 256, 272 (2011). In Fontenot, Plaintiff alleged that she was
 14 entitled to Wrongful Foreclosure as MERS lacked the authority to assign the Deed of Trust to
 15 HSBC. Fontenot found that even if this was true, it is difficult to conceive how Plaintiff was
 16 prejudiced by this allegedly ‘improper’ assignment, and there is no allegation to that effect.
 17 Because a promissory note is a negotiable instrument, a borrower must anticipate it can and
 18 might be transferred to another creditor. As to plaintiff, an assignment merely substituted one
 19 creditor for another, without changing her obligations under the note. Plaintiff effectively
 20 concedes she was in default, and she does not allege that the transfer to HSBC Bank as Trustee
 21 interfered in any manner with her payment of the note, nor that the original lender would have
 22 refrained from foreclosure under the circumstances presented. “If MERS indeed lacked
 23 authority to make the assignment, the true victim was not plaintiff but the original lender, which
 24 would have suffered the unauthorized loss of a \$1 million promissory note.” Id. “Given the
 25 presumption of regularity, if plaintiff contended the sale was invalid because HSBC had no
 26 authority to conduct the sale, the burden rested with plaintiff affirmatively to plead facts
 27 demonstrating the impropriety.” Id. at 270. As Plaintiff cannot overcome the presumption that
 28 the sale was conducted regularly, and cannot show that she was prejudiced by the alleged

1 irregularities in the foreclosure process, Plaintiff cannot state a claim for Wrongful Foreclosure.

2 For the above reasons, Plaintiff's Wrongful Foreclosure claim should be dismissed.

C. Plaintiff's Third Claim for Relief for Breach of Express Agreement is Fatally Defective.

The elements that must be alleged for a breach of contract claim are (1) a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to plaintiff. Troyk v. Farmers Group, Inc., 171 Cal.App.4th 1305, 1352 (2009). "Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity." Levy v. State Farm Mut. Auto. Ins. Co., 150 Cal.App.4th 1, 5 (2007).

10 Plaintiff states that the contract at issue is the Deed of Trust. She alleges that the
11 Defendants breached it as they are conducting a foreclosure sale without authority. This
12 argument is contradictory and cannot impose liability for a breach of contract claim. Plaintiff
13 bases her entire Complaint on the allegation that none of the Defendants are entitled to foreclose
14 as they have no interest in the Deed of Trust. If as Plaintiff claims, the Defendants are not
15 parties to the Deed of Trust, then they cannot be in breach of a contract that they are not parties
16 to. Therefore, Plaintiff's Breach of Contract claim is fatally defective.

D. Plaintiff's Fourth Claim for Relief for Implied Contract is Fatally Defective.

18 Plaintiffs' Fourth Claim for Relief is uncertain. Plaintiff references a Deed of Trust
19 between herself and Wells Fargo. However, Wells Fargo is not, and has never been a party to
20 the Deed of Trust Plaintiff references throughout the Complaint. Therefore, it is uncertain what
21 Deed of Trust Plaintiff is referring to. If Plaintiff is referring to the Deed of Trust attached to
22 her Complaint, Plaintiffs claim here fails for the same reasons that her Breach of Written
23 Agreement claim fails.

24 Plaintiff alleges here that MERS violated the PSA. (Complaint, ¶84). However, Plaintiff
25 does not have standing to bring a claim on behalf of the PSA, and therefore this argument must
26 be disregarded.

27 Plaintiff next claims that Defendants breached the implied covenant of good faith and
28 fair dealing. Every contract ‘imposes upon each party a duty of good faith and fair dealing in its

1 performance and its enforcement. McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 798
 2 (2008). “To establish a breach of an implied covenant of good faith and fair dealing, a plaintiff
 3 must establish the existence of a contractual obligation, along with conduct that frustrates the
 4 other party’s rights to benefit from the contract.” Id. Here, as set forth above, Plaintiff has failed
 5 to allege a contract. Therefore there can be no claim for a breach of the covenant of good faith
 6 and fair dealing. Even if this were not the case, Plaintiff has not alleged a valid claim under this
 7 theory. Plaintiff alleges that

8 **E. Plaintiff’s Fifth Claim for Relief for Slander of Title is Fatally Defective.**

9 The elements of a cause of action for slander of title are (1) a publication, which is (2)
 10 without privilege or justification, (3) false, and (4) causes pecuniary loss. Manhattan Loft, LLC
 11 v. Mercury Liquors, Inc., 173 Cal.App.4th 1040, 1051 (2009). Here Plaintiff alleges that
 12 Defendants published false statements that disparaged their property by recording void or
 13 voidable title documents. (Complaint, ¶88). Plaintiff alleges that these documents were false as
 14 Defendants did not have standing to record them and do not have standing to foreclose.
 15 (Complaint, ¶97). Plaintiff alleges that she was damaged by documents as she could potentially
 16 lose legal title to the property, and that she “made payments not credited to their account to an
 17 entity that was not the true holder of the beneficiary interest under his [sic] Deed of Trust.”
 18 (Complaint, ¶102). As these allegations are insufficient to establish a valid claim for Slander of
 19 Title, Plaintiff’s Slander of Title claim for relief should be dismissed.

20 **1. Plaintiff cannot show that the documents were ‘publications’**

21 Foreclosure notices do not slander title in that they do not disparage land. Flores v.
 22 EMC Mortgage Company, -- F.Supp.2d –, 2014 WL 641097 at *26 (E.D.Cal. 2014) *citing Ortiz*
 23 v. Accredited Home Inc., 639 F.Supp.2d 1159, 1168 (S.D.Cal. 2009) (“The recorded foreclosure
 24 Notices do not affect Plaintiffs’ title, ownership, or possession of the property.”) As such, the
 25 foreclosure Notices *cannot* be a basis upon which a Slander of Title claim may be based.

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2. Plaintiff cannot show that the documents were published without
‘privilege or justification.’

3 Plaintiff's slander of title cause of action fails as the recorded foreclosure documents
4 were privileged. Flores v. EMC Mortgage Company, -- F.Supp.2d --, 2014 WL 641097 at *26
5 (E.D.Cal. 2014). Civil Code Section 2924(d), which is at the beginning of the statutes
6 governing foreclosures, specifically provides that the mailing, publication, and delivery of
7 foreclosure notices shall constitute privileged communications. The only exception for this rule
8 is for malicious prosecution actions, which is not an issue in this case. Silberg v. Anderson, 50
9 Cal.3d 205, 213-15 (1990). As the foreclosure notices are privileged, the 'publication' of these
10 documents cannot form the basis of a slander of title claim, and Plaintiff's slander of title claim,
11 which is based on the 'publication' of the foreclosure documents must fail. Kachlon v.
12 Markowitz, 168 Cal. App. 4th 316, 333-336 (2008).

13 Further, Plaintiffs have not alleged that the documents were recorded without
14 ‘justification.’ Plaintiffs have not alleged that the Defendants recorded the foreclosure notices
15 without believing that they have standing to foreclose.

3. Plaintiff cannot show that the documents were ‘false.’

17 As stated throughout Motion, the borrower has no standing to challenge either the
18 beneficiary or the trustee's right to act as the pursuant to the terms of the Deed of Trust, and
19 cannot challenge the beneficiary's right to either assign its interest in the Deed of Trust,
20 substitute in a new foreclosure trustee or proceed to foreclosure sale. Gomes v. Countrywide
21 Home Loans, 192 Cal.App.4th 1149, 1154-1155 (2011) ("Nowhere do[] the [foreclosure
22 statutes] provide for a judicial action to determine whether the person initiating the foreclosure
23 process is indeed authorized....The recognition of the right to bring a lawsuit to determine a
24 nominee's authorization to proceed with foreclosure on behalf of the noteholder would
25 fundamentally undermine the nonjudicial nature of the process and introduce the possibility of
26 lawsuits filed solely for the purpose of delaying valid foreclosures."). In addition, as stated
27 above, Plaintiff cannot show that the foreclosure documents were improper. Even if the
28 foreclosure documents were procedurally improper, Plaintiff has not met her burden of proving

1 that she was injured by this alleged act. For these reasons, and for the reasons stated throughout
 2 this Motion, Plaintiff has not and cannot show that the foreclosure documents were 'false,' and
 3 therefore as a matter of law her Slander of Title claim fails.

4 **4. Lastly, Plaintiff cannot show that the allegedly 'false' documents
 5 caused her any pecuniary loss.**

6 Plaintiff's cause of action fails as she has not pled that she has suffered any damages as a
 7 result of the alleged slander of title. Here, Plaintiffs' alleged damages (foreclosure) are not
 8 caused by any wrongdoing on behalf of Defendants, but by her failure to make her loan
 9 payments. Javaheri v. JPMorgan Chase Bank, N.A., 2012 WL 3426278 at *6 (C.D.Cal.).
 10 Plaintiffs' have not shown that they were prejudiced by the allegedly improper foreclosure
 11 document. Siliga v. Mortgage Electronic Registration Systems, Inc., 219 Cal.App.4th 75, 85
 12 (borrowers lacked standing to complain about loan servicer's and assignee's alleged lack of
 13 authority to foreclose on deed of trust where borrowers were in default under the note, absent
 14 evidence that the original lender would have refrained from foreclosure.) For these reasons,
 15 Plaintiff's Slander of Title Claim is fatally defective.

16 **F. Plaintiff's Sixth Claim for Relief for Violation of 18 U.S.C. Section 1962 is
 17 Fatally Defective.**

18 A plaintiff may seek civil remedies for RICO violations if he has been "injured in his
 19 business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). The
 20 elements of a RICO claim are "(1) conduct; (2) of an enterprise; (3) through a pattern (4) of
 21 racketeering activities (known as 'predicate acts'); (5) causing injury to the plaintiff's 'business
 22 or property.' " Pedersen v. Greenpoint Mortgage Funding, Inc., 900 F. Supp. 2d 1071, 1082
 23 (E.D. Cal. 2012) *citing Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.1996). The fifth element
 24 has two subparts: the plaintiff must show that the injury was proximately caused by the conduct
 25 and that he has suffered a concrete financial loss. Pedersen v. Greenpoint Mortgage Funding,
 26 Inc., 900 F. Supp. 2d 1071, 1082 (E.D. Cal. 2012) *citing Chaset v. Fleer/Skybox Intern., LP*,
 27 300 F.3d 1083, 1086 (9th Cir. 2002). As Plaintiff has not sufficiently pled all of the elements
 28 of her RICO claim, the Court should dismiss this claim for relief.

1 **1. Plaintiff has not shown that the ‘Conduct’ element was met.**

2 Predatory lending, and the creation of false foreclosure notices cannot be the basis of a
 3 civil RICO claim for relief. Pedersen v. Greenpoint Mortgage Funding, Inc., 900 F. Supp. 2d
 4 1071, 1081-83 (E.D. Cal. 2012) *citing Ohlendorf v. American Brokers* 2012 WL 718682 at
 5 *11–12 (E.D.Cal. 2012) (“Neither fraud, in and of itself, nor the creation of fraudulent loan
 6 documents are predicate offenses under RICO.”), *and Derakhshan v. Mortgage Electronic*
 7 Registration Systems, 2009 WL 3346780 at *4 (C.D.Cal. 2009) (predatory lending is not a
 8 predicate offense for RICO). As Plaintiff’s RICO claim is based *entirely* on allegations of
 9 predatory lending, and the creation of false foreclosure notices, Plaintiff’s RICO claim must be
 10 dismissed.

11 Further, heightened pleading standards of Rule 9(b) apply when the RICO predicate acts
 12 are acts of fraud, such as the case here. Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065–66
 13 (9th Cir. 2004) *citing Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th
 14 Cir.1989)). Under Rule 9(b)’s requirement, plaintiffs must plead with particularity the time,
 15 place, and manner of each act of fraud, as well as the role of each defendant in each scheme.
 16 FED.R.CIV.P. 9(b); Sun Savings & Loan Ass’n v. Dierdorff, 825 F.2d 187, 196 (9th Cir.1987)
 17 (complaint pleaded fraud with sufficient particularity by specifically alleging four instances of
 18 mail fraud, including “the dates on which the letters were written, by whom and to whom the
 19 letters were sent, the letters’ content, and the letters’ role in the fraudulent scheme”). Here,
 20 Plaintiff has not met Rule 9’s heightened pleading requirements.

21 **2. Plaintiff has not shown that the ‘Enterprise’ element was met.**

22 Plaintiff’s RICO claim fails as she has not established an ‘enterprise.’ In order to state
 23 that there exists an ‘enterprise’ Plaintiff must allege that there is a “(i) a common purpose of
 24 engaging in a course of conduct; (ii) evidence of an ‘ongoing organization, formal or informal’;
 25 and (iii) evidence that the various associates function as a continuing unit.” Ellis v. J.P. Morgan
 26 Chase & Co., J.P., 950 F.Supp.2d 1062, 1088 (E.D.Cal. 2013) *citing United States v. Turkette*,
 27 452 U.S. 576, 583 (1981). Plaintiff must allege that the ‘enterprise’ is distinctive from the
 28 Defendants themselves, and that the underlying conduct is distinct from their own affairs. Ellis

1 v. J.P. Morgan Chase & Co., J.P., 950 F.Supp.2d 1062, 1089 (E.D.Cal. 2013). Ellis was a
 2 factually similar case where the Court held that the Plaintiff's allegations that the lender and the
 3 mortgage servicer engaged in RICO violations when foreclosing on her house had no merit.

4 Here, as in Ellis, Plaintiff has failed to allege activities that the Defendant's engaged
 5 in that were distinct from their own affairs. Therefore, her claim for relief for RICO should be
 6 dismissed.

7 **3. Plaintiff has not shown that the 'Injury' element was met.**

8 Here, Plaintiff cannot show that the alleged RICO violation was the proximate cause of
 9 her loss. Instead, Plaintiffs' failure to make her loan payments as required is the proximate
 10 cause of the loss of her home.

11 **G. Plaintiff's Seventh Claim for Relief for Unfair Business Practices is Fatally
 12 Defective.**

13 **1. Plaintiff's Section 1700 claim fails because Plaintiff has failed to allege
 14 a violation of a predicate act which would support such a claim.**

15 In order to state a claim for a violation of Business & Professions Code §17200 plaintiffs
 16 must allege facts to demonstrate that the business act of practice violates an underlying law.
 17 Archundia v. Chase Home Finance LLC, 2009 WL 1796295 at *6 (S.D. Cal.); Cisneros v.
 18 Instant Capital Funding Group, Inc., 263 F.R.D 595, 610 (E.D. Cal. 2009) ("The UCL allows a
 19 private plaintiff to proceed under it to seek redress for conduct which violates any predicate
 20 statute."). Here, Plaintiff's section 17200 claims are based upon the claims made throughout his
 21 Complaint, which as set forth throughout this Motion, can impose no liability upon moving
 22 Defendants. Therefore, Plaintiff's Business & Professions Code §17200 fails as he has not
 23 properly alleged that Defendants have violated a predicate statute.

24 **2. Plaintiff's Section 1700 claim fails because Plaintiff has not alleged he
 25 has suffered an injury-in-fact.**

26 In order to assert a claim under Business & Professions Code §17200, a Plaintiff must
 27 have "suffered an injury in fact and has lost money or property as a result of such unfair
 28 competition." Rodriguez v. JP Morgan Chase & Co., 809 F.Supp.2d 1291, 1297 (S.D. Cal.

1 2011) *citing Business & Professions Code* § 17204 & 17535; *DeLeon v. Wells Fargo Bank*,
2 2011 WL 311376 at *7 (N.D. Cal.) (The Court held that the bank’s alleged misrepresentations
3 that no foreclosure sale would occur during the loan modification process did not cause the loss
4 of Plaintiff’s home at the foreclosure sale. Instead, the defaulting Plaintiff’s failure to tender the
5 loan amount due caused the loss of the home.) Here, as in *DeLeon*, Plaintiff has not suffered an
6 ‘injury-in-fact’ arising out the alleged violation of Business & Professions Code §17200.

3. Plaintiff's Section 1700 claim fails because this statute only applies to ongoing conduct, and is not intended to remedy past wrongs.

9 Since the underlying cause of action challenge acts which have already occurred, the
10 statute is inapplicable. The statute applies only to ongoing conduct; it is not intended to remedy
11 past wrongs. Business and Professions Code §17200 provides in relevant part that "unfair
12 competition shall mean and include unlawful, unfair or fraudulent business practice . . ." The
13 California Supreme Court has held that the word "practice" requires, at a minimum, ongoing
14 conduct. People v. McKale, 25 Cal.3d 626, 632 (1979). Relief under § 17200 is unavailable to
15 remedy past conduct. Id. Accordingly, this claim fails and the Motion to Dismiss should be
16 granted without leave to amend.

III. CONCLUSION

18 In order to survive a motion to dismiss for failure to state a claim, a complaint must set
19 forth “enough facts to state a claim for relief that is plausible on its fact.” Bell Atlantic Corp. v.
20 Twombly, 550 U.S. 544, 570 (2007). Plaintiff’s Complaint constitutes nothing more, at best,
21 than the bare formulaic recitation of some (but not all) of the elements of various claims for
22 relief, lacking in specific facts and implausible on its fact. A court need not permit an attempt
23 to amend the complaint if it determines that the pleading could not possibly be cured by
24 allegations of other facts. Albrecht v. Lund, 845 F.2d 193, 195-196 (9th Cir. 1998) (no liability

25 //

26 | //

27 | //

28

1 as a matter of law); Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)
2 (amendment futile). As such, Plaintiff's Complaint should be dismissed without leave to amend
3 as to Ocwen.

4

5 Dated: March 17, 2014

6

HOUSER & ALLISON
A Professional Corporation

7

/s/ Elizabeth Dolan Scott

8 Eric D. Houser

9 Elizabeth Dolan Scott

10 Attorney for Defendants OCWEN LOAN
11 SERVICING, LLC.; DEUTSCHE BANK
12 NATIONAL TRUST COMPANY, AS
13 TRUSTEE FOR EQUIFIRST LOAN
14 SECURITIZATION TRUST 2007-1,
15 MORTGAGE PASS-THROUGH
16 CERTIFICATES, SERIES 2007-1
17 (Erroneously sued as DEUTSCHE BANK,
18 NATIONAL TRUST
19 COMPANY, TRUSTEE EQUIFIRST
20 LOAN SECURITIZATION TRUST)

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 9970 Research Drive, Irvine, California 92618.

On March 17, 2014, I served the following document(s) described as follows:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
DISMISS PLAINTIFF'S COMPLAINT BY DEFENDANTS OCWEN LOAN
SERVICING, LLC. AND DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE FOR EQUIFIRST LOAN SECURITIZATION TRUST 2007-1,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-1**

On the following interested parties in this action:

Michael Yesk
Megan Dailey
70 Doray Drive, Suite 16
Pleasant Hill, CA 94523
Attorneys for Plaintiffs

[X] VIA FIRST CLASS MAIL—CCP §§ 1013(a); 2015.5: By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on the date following ordinary business practices. I am readily familiar with my firm's business practice and collection and processing of mail with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Irvine, California, with postage thereon fully prepaid that same day in the ordinary course of business.

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

Executed On March 17, 2014 at Irvine, California.

/s/ Tami Kroglo
Tami Kroglo